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Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *State v. Geurts*, No. 9281 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

STATE OF UTAH,

Plaintiff and Respondent,

vs.

THEODORE I. GEURTS,

Defendant and Appellant.

Supreme Court, Utah

Case No.
9281

PETITION FOR REHEARING AND RECONSIDERATION

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IN THE SUPREME COURT
of the
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STATE OF UTAH,

Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case No.
9281

PETITION FOR REHEARING AND RECONSIDERATION

COMES NOW the defendant, THEODORE I. GEURTS, and moves the court for a rehearing of the above entitled case and reconsideration of the court's opinion issued therein on February 3, 1961, upon the following grounds:

1. The court erroneously stated and assumed that defendant's counsel, prior to the trial, had been permitted access to the transcript of the testimony of the state's witnesses as given before the grand jury.

2. The court erroneously assumed and stated that the trial court's refusal to permit the defendant to take depositions

was based upon the fact that the defendant had been otherwise furnished full information as to the charges.

3. The court erroneously assumed and stated that the defendant sought depositions of the state's witnesses only for the purpose of discovery.

4. The court erroneously held that the information given to the defendant in the answers to interrogatories was sufficient to use as a basis for cross-examination of the state's witnesses.

5. The refusal of the court to grant the defendant the right to take the depositions of the state's witnesses, or in the alternative a preliminary hearing, deprived the defendant of due process of law in violation of Section 7, Article I of the Constitution of the State of Utah, and in violation of the 14th Amendment of the Constitution of the United States of America.

6. The court erred in holding that there was a common law crime known as "malfeasance in office" which should have advised persons of ordinary intelligence of the meaning of such term.

7. The court erred in holding that the three charges in the accusation in this case were such charges as could be charged in a single indictment and tried in a single trial under the rules of criminal procedure of the state of Utah.

ARGUMENT

POINT I

THE COURT ERRONEOUSLY STATED AND ASSUMED THAT DEFENDANT'S COUNSEL, PRIOR TO

THE TRIAL, HAD BEEN PERMITTED ACCESS TO THE TRANSCRIPT OF THE TESTIMONY OF THE STATE'S WITNESSES AS GIVEN BEFORE THE GRAND JURY.

POINT II

THE COURT ERRONEOUSLY ASSUMED AND STATED THAT THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENDANT TO TAKE DEPOSITIONS WAS BASED UPON THE FACT THAT THE DEFENDANT HAD BEEN OTHERWISE FURNISHED FULL INFORMATION AS TO THE CHARGES.

POINT III

THE COURT ERRONEOUSLY ASSUMED AND STATED THAT THE DEFENDANT SOUGHT DEPOSITIONS OF THE STATE'S WITNESSES ONLY FOR THE PURPOSE OF DISCOVERY.

POINT IV

THE COURT ERRONEOUSLY HELD THAT THE INFORMATION GIVEN TO THE DEFENDANT IN THE ANSWERS TO INTERROGATORIES WAS SUFFICIENT TO USE AS A BASIS FOR CROSS-EXAMINATION OF THE STATE'S WITNESSES.

POINT V

THE REFUSAL OF THE COURT TO GRANT THE DEFENDANT THE RIGHT TO TAKE THE DEPOSITIONS OF THE STATE'S WITNESSES, OR IN THE ALTERNA-

TIVE A PRELIMINARY HEARING, DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW IN VIOLATION OF SECTION 7, ARTICLE I OF THE CONSTITUTION OF THE STATE OF UTAH, AND IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Counsel will argue these points together as they relate generally to the same subject matter.

Both the prevailing and the dissenting opinion assume that counsel for defense had access to the transcript of the grand jury proceedings. This is not true. Counsel has not seen the transcript to this date.

The decision of this court upholding the right of counsel for Commissioner Geurts in the criminal case to see the grand jury transcript was issued on September 10, 1959. In October Judge Faux issued his ruling on the defense motion to quash. Immediately the defendant filed a demand for a bill of particulars. This demand came on for hearing on November 2, 1959, and was granted by the court. At that time counsel for the defendant informally inquired of Judge Faux as to when he would have the grand jury transcript "screened" so as to permit the defendant's counsel to examine the same. Judge Faux stated that the work of screening would be quite extensive; that he would not undertake it until it appeared that the criminal case was going to trial and that therefore, the matter should stand as it was until the bill of particulars was furnished. However, he stated, when the criminal case approached trial this transcript would be made available to the defendant in sufficient time for adequate examination.

This appeared then and it now appears to be a logical position for Judge Faux to have taken, and the defendant took no exception thereto. However, the bill of particulars was never furnished and the criminal case never did come anywhere near trial. In fact the facts and circumstances force the conclusion that one of the reasons why the criminal case was never brought to trial was that the district attorney was willing to go to any lengths to prevent the defendant's counsel from examining the grand jury transcript.

If there is any question in the court's mind as to whether this transcript has been made available to counsel for the defense, it can be dispelled by reading pages 310 and 311 of the record (Tr. 224 and 225). There District Attorney Banks attempted to cross-examine Mr. Geurts from the grand jury transcript. Counsel for the defense objected to this procedure on the grounds that the grand jury transcript had never been made available to the defendant for examination. The objection was sustained by Judge Van Cott.

The principal premise, therefore, upon which the court bases its conclusion that the refusal to permit the taking of depositions was not prejudicial falls, and the court should change its position and hold that this error was prejudicial.

In its opinion the court concludes that Judge Van Cott's denial of the defendant's demand to take the depositions of the state's witnesses was based upon the ground that the defendant already had full information in the case. A reading of the record shows that this is not so. At page 20 of the record is found the state's motion to suppress the taking of depositions. This motion is not upon the ground that the defendant already had all information, but upon the ground

"that the defendant does not have the right to take depositions in this action in that this action is civil in nature but criminal in form." This is the basis upon which the motion was sought and the basis upon which Judge Van Cott orally stated from the bench that he was granting the motion. Furthermore, it is a basis that this court has already held was erroneous.

The court further is not justified in its statement that in regard to the taking of depositions the defendant does not "argue their value for impeachment or cross-examination." It is true that in the brief of the defendant counsel devotes this section principally to the question of the use of the depositions as a means of eliminating Count I prior to trial. This was done principally because this is the point that appeared to counsel to be the one which required the most discussion. The use of depositions for the purpose of impeachment and cross-examination and the disadvantage which comes from the lack of such depositions is too clear to anyone who has tried a law suit to require that it be labored in a brief.

Under the points relied upon on appeal, we stated "The court erred in denying the defendant the right to take the depositions of witnesses prior to trial, or in the alternative to a preliminary hearing." The question of the use of depositions for impeachment and cross-examination came up and was discussed at some length during the oral argument on the case. At that time counsel stated that he felt he had been prejudiced by the lack of depositions for this purpose. If the court will recall, Mr. Justice Wade from the bench asked the counsel for the defendant if he had not talked to the witnesses and did not know what they were going to say. In response

to this question from Justice Wade, counsel for the defendant stated that in regard to Count I he had talked to Mr. Reed and that Mr. Reed had discussed the matter rather freely, and that as to such count, the defendant's counsel felt he was under no disadvantage. Counsel further stated, however, that the witnesses as to Count II and Count III were far from willing to discuss the matter freely and that counsel felt he was under a distinct disadvantage as to these two counts.

Any member of this court who has ever defended a criminal case must be well aware of the reluctance of state witnesses to talk freely to counsel for the defense prior to the time the case comes to trial.

It is difficult to see how the information given to the defendant in the state's answers to interrogatories (R. 14-17) could in any way be utilized for the purpose of cross-examination of the witnesses. While this document is somewhat more voluminous and verbose than the accusation itself, it is certainly no more detailed and offers no information that can be used in cross-examination. It merely states that three men, Gerardus Kip, Helmeth F. Kleist, and Joseph W. Bertram, on four occasions between February 1, 1959 and May 31, 1959 took soil, shrubs and trees to the homes of the defendant and his son-in-law. It does not say who took what and in what quantities, or on what certain days. It gives no details which would permit counsel on cross-examination to determine whether or not they were city trees and shrubs, as contended by the state, or privately owned trees and shrubs, as contended by the defendant; or whether the city employees did this work on city time, as contended by the state, or on their own time, as contended by the defendant. Other than to give a panoramic

view of what the state claimed, they were valueless. Had the defendant been permitted to take depositions as this court has held he was entitled to do, he would have tied this matter down to details which he could have checked before trial and could have determined the credibility of these particular witnesses, both from the standpoint of their interest in the case and the accuracy of their recollection of what had occurred.

The denial of this right, of which this court acknowledges the defendant has been deprived, has deprived the defendant of his right of a fair trial and to due process of law in violation of Section 7, Article I of the Constitution of the State of Utah and the 14th Amendment of the Constitution of the United States.

POINT VI

THE COURT ERRED IN HOLDING THAT THERE WAS A COMMON LAW CRIME KNOWN AS "MALFEASANCE IN OFFICE" WHICH SHOULD HAVE ADVISED PERSONS OF ORDINARY INTELLIGENCE OF THE MEANING OF SUCH TERM.

The court states in its opinion "malfeasance is a crime recognized at common law." With this statement counsel for the defense takes issue. Reference is made to our brief, pages 19, 20 and 21. At common law as at present the term malfeasance is a generic term describing a group of offenses. It is not an offense in and of itself. It is just as general a term as the word "tort," which covers a multitude of civil wrongs under the common law. It is not a term of any exact or definite meaning. We agree that the framers of our constitution quite properly made public officers removable

from office for malfeasance in office. This, however, is not a self-executing provision, but is a provision which requires legislative implementation. The legislative implementation under a general constitutional term covering a broad scope should not be merely in the language of the constitution, but should be a definite and precise description of the acts prohibited. It is our contention that failure of the legislature to so do has made the statute in question vulnerable under the 14th Amendment to the Constitution of the United States and Article I, Section 7 of the Constitution of the State of Utah.

POINT VII

THE COURT ERRONEOUSLY HELD THAT THE THREE CHARGES IN THE ACCUSATION IN THIS CASE WERE SUCH CHARGES AS COULD BE CHARGED IN A SINGLE INDICTMENT AND TRIED IN A SINGLE TRIAL UNDER THE RULES OF CRIMINAL PROCEDURE OF THE LAWS OF THE STATE OF UTAH.

At the risk of again being censored by the court for being "overzealous," counsel for the defense again urges that the jury might well have been prejudiced against the defendant by the evidence submitted by the state in its abortive attempt to prove Count I. In answering this contention this court states in effect that under the criminal law Counts I, II and III could have been charged and tried together and that it would lead to an absurdity if the dismissal or a finding of not guilty as to one or more counts could be held to be prejudicial against the defendant on the remaining count of which he was found guilty.

Counsel represents to the court that under the rules of

criminal procedure of this state, Counts I, II and III could not have been charged together and could not have been tried together. Sec. 77-21-31, U.C.A. 1953, covers the matter of joinder of criminal offenses in a single information or indictment. This section as amended by Chapter 170 of the Laws of Utah, 1957, provides that the information or indictment must charge but one offense. It holds that the same offense may be set forth in different forms under different counts or that different offenses may be charged together where they are related or connected together in their commission. Under this section the court has held that the following offenses may not be charged or tried together: Bigamy and adultery, *U. S. v. West*, 7 Ut. 437, 27 P. 84; rape and adultery, *State v. Anderton*, 69 Ut. 52, 252 Pac. 280.

We do not have here a situation where one series of acts may give rise to two offenses and may thus be charged in two counts such as forgery and the making and passing of a forged instrument, or burglary and larceny. Here the offenses charged are separate, unrelated and distinct. If Count I were brought under the criminal law it would have to be brought under the bribery statute or under the conflict of interest statute. If Count II were brought under the criminal law, it would be larceny or embezzlement. If Count III were brought under the criminal law it would be aiding and abetting the preparation of a false or fictitious claim. Furthermore, there is no connection between the acts that occurred so far as the time or method of occurrence. They are separate, distinct and independent transactions. These acts could not have been joined or tried in a single indictment or information under the Rules of Criminal Procedure.

We did not make a motion for severance because we did not feel we were proceeding under the code of criminal procedure, and other cases from this court involving removal indicate that several causes can be joined. However, we do maintain that recourse cannot be had to the criminal procedure as a basis for a holding that joinder was not prejudicial. This court itself points out that the facts involved in Count I are separate and distinct from the facts in Count II, and therefore, none of the evidence going to Count I could tend to prove the defendant guilty of Count II. However, this court can take judicial notice of the fact that the evidence under Count I was of such an inflammatory nature that it might make the jury much more ready to believe the defendant guilty of any other offense of any nature whatsoever. Under these circumstances it is our position that it was an abuse of discretion of the trial court to refuse a mistrial on the basis that the defendant was prejudiced by having the jury hear the evidence presented under Count I, notwithstanding the instruction of the court that they should disregard the same. We are sure the members of this court, as lawyers with extensive trial practice either as counsel or judge, must agree that one of the most futile gestures in our judicial procedure is the instruction to disregard evidence already heard.

CONCLUSION

The court has pointed out in its opinion that it may be possible for counsel to dissect an instruction and show that the individual parts thereof are faulty even though the instructions taken as a whole may properly inform the jury as to the elements of the offense, and as to their duty in regard

thereto. Likewise, it is possible for this court to take each individual error in the case and say this alone would not have prejudiced the substantial rights of the defendant when all of the errors taken together may well have prevented the defendant from having a fair and impartial trial.

This is not a case where the guilt of the defendant stands out clearly. It is a case balanced on a razor's edge where any error against the defendant may have been the thing that tipped the scale. It is further a case where the single straw may not have unduly laden the camel, but the cumulative weight of all the straws may have broken its back. Without doubt the prosecutor and the court must be diligent in their efforts to assure proper handling of public affairs, but the danger to the public in this case, taken at its worst, weighs but little in the balance beside what this conviction has done to a member of this community and to his family. Any question as to whether or not a fair and impartial trial was had should be resolved in favor of a reversal of the court below.

Counsel urges that the court reconsider this case, reset the same for oral argument if the court feels that such would contribute to a reconsideration, and upon such reconsideration with or without argument, reverse the decision of the court below.

Respectfully submitted,

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